

THE UNITED STATES SUPREME COURT—AND THE COMMERCIAL ERA

It requires about thirty-five minutes to read the Constitution of the United States. To read and digest the decisions of the courts construing the Constitution, and the treatises and miscellaneous books which have been written upon it, would exhaust at least five years. Every section of the Constitution is so incrustated with decisions that the original text is almost lost sight of, just as the sides of a house are hidden when they are covered from top to bottom with a bounteous growth of creeper vines, and one cannot say whether they are brick or wood.

It is helpful and necessary for the bench and bar, now and then, to remove the thick coat of adjudications which incase the Constitution and to look at the naked text of that great document in its original form.

The Constitution of the United States is a perfect piece of political architecture. It is not only beautiful and symmetrical, as a whole structure, but its departments are so arranged that, while distinct and separate from each other, they communicate by wide doors through which a healthful and vigorous interchange of views can be constantly established between them. The three departments,—the Executive, Legislative and Judicial,—although forming part of the same political establishment, are separated from each other by broad and distinct lines. Each constitutes a perfect system within itself. The authority and scope of each branch of the government are plainly marked out, and the functions of the officials who are charged with work therein are clearly defined. This great edifice, although it has already received so many encomiums, is, in political architecture, nondescript. It has no prototype. It is *sui generis*. It is a union of States, existing by virtue of written articles of association, which define its purposes, clothe it with the powers necessary for carrying them into effect, and give healthful and perpetual vigor to the same, leaving the constituent States with all their original force and authority, except that part conferred upon the central government. The consideration for this political pact is full and reciprocal. The powers drawn from the States nourish the Federal Government, and, in return, it guarantees security and protection to the States, home and abroad. The ele-

mentary or fundamental principle of a federation is, as put by one writer: "To combine a number of independent communities into one whole without destroying, on the one hand, the *independence of the several States*, or limiting, on the other, the *effective force of that body*." Another learned author reiterates this view in different language: "On the one hand, each of the members of the Union must be *wholly independent* in those matters which *concern each member only*; on the other hand, all must be subject to a *common power* in those matters which concern the *whole collectively*."

No government, based upon a written constitution like ours, could exist without a branch or department to which is committed the right to say whether a statute is authorized by the letter or spirit of the basic contract. This important function is committed to the judiciary, and its jurisdiction and general scope of powers are clearly set forth. Necessarily, the judiciary is not only vested with the function of declaring whether a certain act is warranted, or transcends the Constitution, but it must, to be effective, have the power to execute its judgments through the instrumentality of its marshals and *posse comitatus* which may, if occasion demands, swell into the whole military force of the country.

Hamilton wrote, in the *Federalist*, of the judiciary: "It may be truly said to have neither *force* nor *will*, but merely *judgment*, and must ultimately depend upon the aid of the executive arm, even for efficacy of its judgments. . . . It proves incontestably that the judiciary is, beyond comparison, the weakest of the three departments of power; that it can never attack with success either of the other two, and that all possible care is requisite to enable it to defend itself against their attacks." Montesquieu supports this general view. Whether the judiciary has substituted its *will* for its *judgment*, or whether the remarks I have quoted were abstract thoughts and not applicable to the Federal Government which had been created, or whether conditions originally existing have absolutely changed, or whether one or all of these facts measurably co-operate to produce the result, there is now only a theoretical truth in this opinion of these great men. The Supreme Court of the United States has gradually and naturally, but not by usurpation, risen to the highest pinnacle of power, and, by having the last word, it has overruled statutes without stint, and defeated, on many occasions, the combined will and judgment of the legislative and executive departments of the government, for the latter together make the law. And this result is a necessary one, for if the decrees or judgments of the Supreme Court of the United States should be arrested, or deflected, by legislative or executive interference, the

wheels of the government would instantly stop, and confusion worse confounded would exist in our midst. Happily, there has never arisen any open conflict between this court and the other two branches of the government, although many fierce battles of words have ensued over its decisions, and although at times some bitter criticisms have been made by Federal officials, legislators and others, as to the result produced by the particular judgments of that court.

John Randolph, for example, as his historian puts it, wrathful beyond measure over the failure of the impeachment of Judge Chase, "moved, on the spot, an amendment to the Constitution that 'all judges shall be removed by the President on the joint address of both houses of Congress;'" but the suggestion fell dead, almost as soon as it was born. There has always existed a trait in the American character which teaches absolute submission to official results, and no sooner is an election decided, or a judgment of a court, especially of the Supreme Court of the United States, announced, than the feeling of loyalty to our institutions swallows up political and individual disappointments, and produces general acquiescence.

The distinguishing, perhaps a weak feature, of our government, is that we have a written Constitution. Of course, this is inevitable, because the terms of the political association must be laid down in black and white. The misfortune, however, is that this gives rise to disputes as to the interpretation of the words and sections of the Constitution. Men and parties, differently situated, interpret the instrument differently. It is said that when a cow looks on the grass, it is white. So each individual is apt to put a construction upon the Constitution which agrees with his present prejudices and interests. And this gives rise to manifold controversies which produce uncertainty if not confusion. The language of the Constitution becomes submerged under different interpretations. Hence, frequent recourse to the original document is healthful. The Constitution prescribes that all Federal statutes and State Constitutions and laws shall be subordinate to the Federal Constitution. Every law must respond satisfactorily to this requirement, and pass through the sieve of the Supreme Court of the United States. If it cannot meet this test, it is thrown out of the body of laws and is henceforth worthless. The plan of the Constitution is that the Acts of Congress must not conflict with that instrument, and the Constitution and laws of the different States must not disagree with either the Acts of Congress or the organic law of the United States. The final burden of the work of interpreting the Constitution of the United States has been thrown upon the Supreme Court; and since

its organization it has been continuously engaged in endeavoring to expound the meaning of the words used therein. Consequently, there has grown up a vast body of judge-made constitutional law, which has, in some instances, enlarged, and in others, restricted the popular or historical meaning of the text. The legal tender decisions are an example of the former, and the income-tax cases of the latter class. Unhappily, too, in the contests, both political and economical, which have been under review in that court, there has crept into the decisions, prevailing and dissenting, much sophistry, inconsistency and doubt. So frequently have National and State statutes been challenged as unconstitutional, that the laws passed by the National and State Legislatures, inspire very little respect. They no longer carry with them moral weight. No strong presumptions of constitutional legality surround them, and hence, they are all assailed with impunity. The lawyers make no bones in attacking them, and the names or character of the legislators who pass the laws are not even known or inquired for. This condition of affairs does not exist in Great Britain. There the Acts of the English Parliament are supreme. When laws are passed by that body, they are not tested by any other written law or constitution. They are not forced to pass through the crucible of a constitutional test to prove that they are invalid. In England, the courts, at most, are called upon, and not frequently, to interpret the meaning of the Acts of Parliament. This avoids a vast amount of work by the English Bar, which is thrown upon American lawyers, and, in passing, it is well to observe that the effect upon the American Bar of these frequent disputes over the meaning of the words of the National and State Constitutions has been to produce a class of advocates whose arguments are principally remarkable for subtle and metaphysical distinctions, and whose conclusions are very often, through a process of labyrinthine and clouded reasoning, strained, inconsistent, or unsound. In England, on the other hand, the forensic arguments are free, simple, natural and logical.

These suggestions of elementary principles prepare the reader for some observations which I shall make upon the effect which our great commercial era has had upon the development of Constitutional law within the last four decades.

Keeping in view that the purpose of the Judiciary Department is to preserve the Constitution in all of its pristine vigor, that is to say, that it is a guardian charged with the trust of maintaining in form and spirit the federation which was formed by the Union of the States, against all attempted encroachments, external or internal, it may be truthfully said that down to this point the Supreme Court

of the United States, through all the vicissitudes of National politics and history, has faithfully, fairly, and substantially, tried to perform its full duty. But it must also be observed that for the last forty years all the courts, both Federal and State, have been far from happy. They have entered upon a new era in constitutional history, caused by the marvelous commercial developments which began in this country after 1873. Questions of a commercial and economical character have been thrust upon them by legislation, many of which properly belonged for regulation to the parties concerned, or to financiers and political economists. Our legislators have often overlooked the important distinction that States and governments are not organized to enter into business, or to make contracts for their citizens, or to interfere with the freedom and development of commerce, except to keep the channels open and unobstructed. Some of the legislation to which I have referred has already been threshed out in the courts, and many decisions have been made covering these economic subjects, but they are generally unsatisfactory and unconvincing, for two reasons: first, in almost every instance where a conflict has arisen, involving Federal or State control, over railroads, corporations or commercial industries, or disputes between capital and labor, the decisions lack unanimity, the Supreme Court of the United States generally dividing into five to four, or six to three, and the publication of the majority and minority opinions has shown such a divergence of views between the judges, that all the questions probably will be, in due course, re-argued and re-decided, or the laws upon which they are based, repealed or modified. For instance, out of seventy-seven cases decided between the October term, 1901, and the same term, 1907 (187 to 207 U. S.), in twenty-nine the court stood five to four; in forty-five, six to three, and in three cases, five to three, one judge being absent or not voting. Second, the cases have mostly been decided upon technical grounds; in vain efforts to reconcile conflicting decisions instead of upon principle. I therefore take the liberty, in the briefest manner, of treating the general subject *de novo*, and upon principle. The necessities of commerce brought into existence within the last fifty years a vast number of corporations, some with large and some with small capital. It may be said without the risk of reasonable contradiction, that it was impossible to conduct our colossal industries unless through these artificial bodies. Individual capital, and individual effort, separate or joint, were positively inadequate to meet demands. The reasons are obvious. Let it suffice that no individual had the necessary money, or if he had, would not invest it in one colossal enterprise. With the

growth of corporations, and the enormous investments of capital, in the various business enterprises, the demands *for* labor, and the demands *of* labor palpably increased. Labor kept full pace, with the rapid march of industrial progress, both in respect to the character and time of employment and as to its remuneration. Out of these conditions the plan was conceived of merging many firms or corporations conducting similar businesses, into one company. These aggregations were soon baptized as "trusts." For instance, fifteen separate co-partnerships or corporations, with an aggregate capital of ten millions were amalgamated into one new body politic, with a capital of fifty millions, and the shares listed on the Exchange and promiscuously sold. This operation frequently repeated produced billions of dollars in share capital, which, in due course, was quickly distributed and absorbed by the public. Instead of these businesses being owned by a few manufacturers, they thenceforth were owned by thousands of investors. Suddenly, there appeared in the country, as if by magic, a class of men who, by one means or another, had acquired immense individual wealth, soaring far into the millions. The people seemed to have been stupefied by the combined spectacle of colossal individual fortunes, enormous aggregations of capital, and the increasing demands of labor, and without a profound study or accurate knowledge of conditions, the cry arose for legislation. Everything was thrown hotch-pot into politics, and it became fashionable to decry trusts and attack capital, whether invested in industrial or railroad enterprises. The State of Illinois led off, in 1870, by opening up in its Constitution (which was followed by an act of the Legislature in 1871) the subject of regulating warehouses where grain was held and inspected. The *Munn* case was decided by the Supreme Court of the United States in 1876, and this legislation sustained. In this case, in upholding the act, it was decided that the limitation by legislative enactment of the rate of charge for services, rendered in a public employment, or for the use of property in which the public has an interest, established no new principle in the law, but only gave a new effect to an old one; and in answer to the argument that this was an attempt at the regulation of commerce, the court held that warehouses for the sorting of grain may incidentally become connected with interstate commerce, but not necessarily so; that their regulation was a thing of domestic concern, and certainly until Congress acted in reference to their interstate relations, the State might exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction. Therewith was a long dissenting opinion by Mr. Justice Field, concurred

in by Strong, J., which closed with this language: "No reason can be assigned to justify legislation, interfering with the legitimate profits of that business, that would not equally justify an intermeddling with the business of any man in the community, so soon, at least, as his business became generally useful." This case has twisted itself like a snake through the Federal courts, and has been freely used by both sides in the same litigation. From that time down, the courts, Federal and State, have been engaged with questions of a cognate character, the effect of the Munn case having been to whet the appetite of the law-makers for this kind of legislation. Then Congress finally entered the field and the Interstate Commerce Law was the result. At the time of its passage, it was purely a speculative undertaking, of doubtful propriety and constitutionality. I had an interview with Jay Gould, in reference to the Bill. It may not be known, but it would have been easy, by perfectly legitimate means, to have defeated it. Jay Gould, with his hand constantly on the pulse of public sentiment, said: "Let it go, or we will get a worse dose next season." But the extraordinary powers vested in the Interstate Commerce Commission were handled dexterously, delicately and prudently by the Commissioners, and the business interests of the country became, in time, used to it, and have now practically acquiesced in the existence of the Commission, as a part of the railroad system of the country. After an eel is skinned once, it is said he does not feel the second operation. But in passing I am forced to state that so long as railroads were built, owned and operated by private capital, the subject of placing them in the charge or under the supervision of a public Commission was, upon principle, capable of being seriously questioned. Especially as the common and statute law gave full redress against all invasions of the rights of the public. A commission to *inquire* would have been infinitely preferable to a commission with *power*. But the Federal courts swallowed the law without a grimace; the *raison d'être* and ultimate *effects and consequences upon republican institutions were not considered*. The crowd seemed to be yelling for laws against railroad corporations. A conflagration started in a hay mow is hard to stop, and a fire again broke out in Congress over trusts, and the Anti-Trust Act was the result. The fact that our highest officials are clamoring for an amendment of this act is all that need be said in criticism of this law. It is as ignorant and hastily devised a piece of legislation as was ever inflicted upon the country. It was the result of pure partisanship—one political party seeking to outdo in speed and apparent solicitude for looking after the interests of the country, its opposing political enemy. The subject of

so-called "trusts" was a new one. Its influence upon business and the welfare of the people, for good or for evil, unknown. It was legislation aimed at a ghost, which nobody had ever seen, but which had been fluently and flippantly talked about by irresponsible politicians and demagogues. I have seen no argument or discussion yet which shows that a corporation with a capital of ten million dollars is harmless, while one for one hundred millions is detrimental, unless it is monopolistic in its true sense. What is the limit of corporation capital? And who is to fix it? All corporations are trusts—in the sense of having aggregated capital. Moreover, this anomalous result is now seen by an inspection of our statutes: that corporations are invited to be formed with perpetual charters and unlimited capital for which handsome license, franchise and other fees and taxes are paid into the exchequer of the States, and yet, alongside, in the same chapter, are ranged laws punishing persons who form trusts as criminals! After the Anti-Trust Act, other National and State legislation followed in *favor* of, not *against*, labor, although the labor unions had been steadily increasing in size, strength and influence. The hours of labor were measured, and throughout the length and breadth of the land, either by laws or through the instrumentality of labor organizations, a policy of dictation was pursued, which was intended to fix by absolute rule all of the relations between the employer and employee. Of course, only the technical side of most of these great questions were threshed out in the courts; but they eventually appeared in one form or another, in the Supreme Court of the United States, where the acts were assailed generally on the ground that they violated the Constitution of the United States, and especially the Fourteenth Amendment. They were sought to be sustained sometimes upon the ground of police power, but generally upon the ground that they came within the commerce clause of the Constitution. And a pitched battle was waged between the Fourteenth Amendment on the one side, and the commerce clause of the Constitution, on the other, neither of which, in my humble judgment, was ever intended to cover such conditions! It is a fact, too, worthy of notice, that the Fourteenth and Fifteenth Amendments were a part of the reconstruction policy of the Republican party, and none of the Southern States were admitted to the Union until after they had unconditionally agreed to adopt them, the Fifteenth Amendment being then in process of becoming a part of the organic law. This Fourteenth Amendment, passed for the protection of blacks, by the construction of the Supreme Court of the United States, became a flaming sword, protecting all the rights of property from invasion by any State in an effort to deprive any per-

sons of life, liberty or property without due process of law, or to deny to any person within its jurisdiction equal protection of the laws. I find no fault with this construction because the broad language of the amendment justified it. I am alluding simply to its history.

The soil upon which the rough and tumble legal battles, arising out of commercial relations, of which I have been speaking, were fought, was the commerce clause of the Constitution. That little sentence of sixteen words: "To regulate commerce with foreign nations and among the several States and with the Indian Tribes," it was argued, covered almost every apparent or alleged need of the public, until it has come to be regarded as an open sesame by legislators for all constitutional problems. Where the devices of necessity, convenience or public clamor could find no refuge under any other clause of that great instrument, they were sought in this little clause. When a murderer had finished his bloody work, in the days of early England, he sought refuge from punishment in a monastery. So the advocates of laws against trusts or corporations, or in favor of labor, point to the power to regulate commerce as one which furnishes an excuse for every conceivable regulation that a false, ephemeral sentiment demands. If commercial development is to be restricted, if labor is to be regulated, if the rights of employer and employee are to be adjusted, if many of the most ordinary affairs of business are to be arranged, the Federal legislator quickly seeks the deep and illimitable caverns of the commerce clause, where by the magic words of public sentiment, the doors are unlocked and he finds spread before him a table groaning with all the delicacies of sophistry, and of long dissenting opinions, which fill him with inspiration to compound new Federal statutes to suit the needs of paternalism or socialism.

Now let us recur to the commerce clause of the Constitution, looking at it quite apart from the decisions of the Federal tribunals of forty years, and keep in view the purposes of the federation, to see if it is capable of being stretched to suit, to speak mildly, the public sentiment or opinion of the hour. It seems to me that there can be no doubt as to the meaning of that clause. Most certainly the framers of the Constitution never dreamed of the commercial conditions which now exist, and that is most apparent from reading the statement of the purposes of the commerce clause, in the *Federalist*:

A very material object of this power was the relief of the States which import and export through other States, from the improper contributions levied on them by the latter. Were these at liberty to regulate the trade between State and States it must be foreseen that ways would be found out to load the articles of import and export during the passage through their

jurisdiction, with duties which would fall on the makers of the latter, and the consumers of the former. We may be assured by past experience, that such a practice would be introduced by future contrivances; and both by that and a common knowledge of human affairs, that it would nourish unceasing animosities, and not improbably terminate in serious interruptions of the public tranquility. To those who do not view the question through the medium of passion or of interest, the desire of the commercial state to collect, in any form, an indirect revenue from their uncommercial neighbors, must appear not less impolitic than it is unfair; since it would stimulate the injured party by resentment as well as interest, to resort to less convenient channels for their foreign trade. But the mild voice of reason, pleading the cause of an enlarged and permanent interest, is but too often drowned, before public bodies as well as individuals, by the clamors of an impatient avidity for immediate and immoderate gain.

The words, "regulate commerce," seem to mean to keep it free of obstructions. Because a stage-coach runs from Vermont into the borders of an adjoining State and the proprietor and his driver live in the first named State, does this give Congress the power to impose new liabilities upon the employer in favor of the employed, not contained in the contract of hiring? Why should the government intervene in such affairs? Does the commerce clause, using the words, "to regulate" commerce, give Congress authority to put into the hands of Federal officers, the *entire control* of railroads and corporations, because they pass through, or do business in different States? To dictate their rates; the character of their equipage; the kind, number and wages of their employees? In a word, to denude their officers of substantially all control of these companies, built and run by private capital, because there is a public use attached to them?

I am not unmindful that a factor of great importance, tending to cause the people to look to the Federal Government for relief, is that we have forty-eight different States which are constantly and busily engaged in legislating upon these subjects, and a business or corporation which extends itself through all, or a great many of these distinct State sovereignties, is apt to find a different class of legislation upon the same subject in each different jurisdiction. As a diamond drill passes through different strata of rocks as it bores its way through the earth, so a railroad or commercial corporation is apt to discover different laws in the different States through which it passes, or in which it operates. In one State there may be a broad and liberal policy displayed in the legislation; in another, a narrow and bigoted system of control or regulation of corporations may exist. Beyond any doubt, this is serious and embarrassing, and many conservative citizens who, without thinking of the ultimate consequences in the change of our government from that

which was instituted by its founders, are willing that the whole matter of the control of commerce, corporations and labor, should be left in the hands of the Federal Government. They do not perhaps give enough attention or weight to the operation of natural laws which will eventually right the inaptitudes, deficiencies and injustice of legislation.

The truth is, the country is in the throes of a dilemma. On the one side there exists all of these questions in respect to trusts, railroads, and capital and labor, which become acute in the time of presidential elections. Are they the proper subjects of legislation at all? If yea, to what extent shall laws attempt to regulate the business questions of the country? On the other hand, there is a deficiency in the Constitution of the United States giving Congress full and ample power to deal with these various and delicate subjects. In my humble judgment, at least, it seems so. The alternative is that there must be amendments to the Constitution. If the people of this country think it wise to clothe the Federal officials with power to regulate all of the questions which grow out of existing commercial conditions, they should realize that it means practically a change of the form of our government. It means a centralized power. It means a diminished interest by our citizens in government. It means the enfeebling of States, even to actual debility. It means more. It means paternalism. Whether the governments, Federal or State, should interfere in the general questions between labor and capital is a serious and profound question. I think that, generally, each should enjoy the most absolute freedom, consistent with public good. The government upon principle has no right to fix the rates of labor; or of its daily duration, or to secure to employees absolute immunity from accidents. Those are matters for private contract. At most, these are temporary shifts which eventually increase the price of production, which falls upon the consumer, and the laborer drinks the poisoned ingredients of his own mixing from his own chalice. Those who suggest the limitation of the hours of labor, or the fixing of its price, are the worst enemies of the laboring class. This country has developed largely through individual force. If laws are passed, by which ambition, skill and energy are to be crushed, and every man, be he stupid or bright, placed upon the same equality, the laborers will, in due course of time, become atrophied, and the ultimate result is paternalism. If our legislators neglect such considerations in the passage of laws, in my judgment, it is the duty of the Federal courts to intervene to prevent an absolute change in our government. Their function

is changed from "expository," after the form of Bentham, into the "censorial" which ascertains what the law ought to be.

The questions, as I have said, are serious and embarrassing. Hamlet boldly sought out the ghost and found it was his father's. If we have a complete knowledge of these questions, our courts have sufficient character, intelligence and courage to deal with them in a way which will preserve our institutions intact. Heretofore our legislation has been largely speculative. It has been invading the spheres of capital and labor, and entering upon the domains of power not given to the Federal Government by the Constitution.

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